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MICHAEL RODAK, JR., CL

Supreme Court of the United States

October Term, 1973

No. 1020

JOSEPH DAVIS,

Petitioner,

against

AMERICAN EXPORT ISBRANDSTEN LINES, INC., and S. S. EXPORT COMMERCE, her engine, tackle, cargo, gear and apparel.

Respondents,

and

TODD SHIPYARDS CORP.,

Third Party Defendants.

BRIEF OF RESPONDENT AMERICAN EXPORT ISBRANDSTEN LINES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Questions Presented

We do not agree that the questions presented by petitioner on page 2 of his Petition reflect the facts and legal issues of this litigation.

The Trial Court found as a fact that the work on the ship's propeller and shaft was under the complete control of Todd Shipyard's Corp. and not under the control of the Master, officers and members of the ship's crew. Furthermore, petitioner, far from being engaged in routine ship's maintenance, was engaged in shipyard work which

was found to be outside the scope of work traditionally performed by ship's crews. Accordingly, petitioner's question No. 1 is not pertinent.

Since *in rem* jurisdiction was *not* perfected against this vessel, petitioner's question No. 2 does not apply to this litigation. This case (despite ambiguous imperfections in the framing of the complaint) started as a civil action with a demand for a trial by jury, and evolved into an admiralty *in personam* action when it appeared that there was no diversity of citizenship between the parties such as to sustain the jurisdiction of the District Court on the civil side.

We submit that the real questions presented by the Petition are:

> 1. Was the Trial Court not correct in holding that petitioner had failed to sustain his burden of proving that the respondent was negligent or that its vessel was unseaworthy?
>
> 2. Was the Trial Court not correct in holding that the respondent did not owe petitioner a warranty of seaworthiness because the nature of the overall work on which petitioner was engaged was not work traditionally performed by ship's crews?
>
> 3. Was the Trial Court not correct in holding that petitioner could not recover from the respondent on a theory of *res ipsa loquitur* because petitioner's work on the propeller and tailshaft was not under the exclusive control of the respondent?

Reasons Why The Writ Should Not Be Granted

1. Despite petitioner's contention to the contrary there is no conflict between the holding of this case and holdings of other Circuit Courts of Appeal. More specifically, there

is no conflict between the decision in this case and *Rogers* v. *United States,* 452 F.2d 1149 (5 C.A. 1972), as alleged by petitioner on page 7 of his Petition. The opinions in this case and in *Rogers* v. *United States, supra,* both apply the tests and standards set forth by this Court in *United Pilots Association* v. *Halecki,* 358 U.S. 613 (1958), and *West* v. *United States,* 361 U.S. 118 (1959), for determining whether a worker is entitled to the warranty of seaworthiness. The differences in results are products of different facts and not because of a difference in the standards and tests applied by the two Courts.

2. The decision in this case by the Trial Court and its affirmance by the United States Court of Appeals for the Second Circuit without opinion do not constitute any limitation over or conflict with the principals set forth by this Court in *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85 (1946), bearing on the warranty of seaworthiness owed to workers engaged in work traditionally performed by ship's crews.

3. This litigation does not present an opportunity for this Court to review issues relating to *in rem* liability as they may apply to the doctrine of *res ipsa loquitur,* for the simple reason that there was no *in rem* jurisdiction in this case. No *in rem* jurisdiction was attempted, let alone perfected.

Statement Of The Case

This is an action brought by petitioner, Joseph Davis, to recover money damages for injuries sustained by him on June 29, 1970, while he was working as a machinist in the employ of third-party defendant Todd Shipyards Corp. Plaintiff was engaged in work involving s/s Export Commerce, a dry-cargo freighter owned by respondent American Export Isbrandsten Lines, Inc.

From June 29, 1970, until July 1, 1970 s/s Export Commerce was in Todd's drydock in Brooklyn for routine ship-

yard repairs. The 11th of the 17 items of work which respondent authorized Todd to perform was:

> "Remove propeller, pull shaft for A. B. S. 3 yr. inspection, fit reconditioned propeller and close up in good order." (Plaintiff's exhibit 2)

Petitioner was engaged in the drydock assisting in the removal of the propeller from the tailshaft of the vessel. During the course of this work the ship's propeller, which weighed some 47,000 pounds and had a diameter of 20 feet, fell off the end of the shaft and struck the scoffolding on which plaintiff and another Todd employee were standing causing plaintiff to sustain certain personal injuries.

The ship's propeller was to be removed for routine replacement and to allow the ship's tailshaft to be pulled for periodic inspection in accordance with the requirements of the United States Coast Guard and the American Bureau of Shipping.

Petitioner, who was the only witness at the trial to claim to have been an eye-witness to the occurrence, could not ascribe a reason for the propeller coming off the end of the shaft.

The only witnesses on the trial were those called on behalf of petitioner. Respondent rested at the end of petitioner's case believing that petitioner had failed to establish a prima-facie case and had failed to sustain his burdens of proof.

Petitioner's witness Earl LaGarde, who had been assistant night foreman for Todd on the evening of the accident, testified that he was in charge of the work being performed by Todd on the propeller and shaft of the vessel and testified further that all the equipment being used was obtained from Todd's own gear room. LaGarde was unable to explain the occurrence of the accident. Finally, petitioner called Captain Swensson as his expert witness with the apparent intention of convincing the Court by his testi-

mony that the removal of a ship's propeller and the pulling of a tailshaft were functions traditionally performed by ship's crews. The Trial Court was not impressed by Swensson's testimony, especially since he responded to the question as to whether the removal of a propeller was traditionally the work of a seaman by stating:

> "Well, it's not the regular kind of work, no, but it can be done if it is necessary". (Tr. 94)*

Petitioner had sought to recover against the respondent shipowner on theories of its negligence and the unseaworthiness of its vessel.

The Trial Court ruled in the Opinion and Order of November 28, 1972, that no negligence of the respondent had been established, that no unseaworthiness of the vessel had been proved and that in any event petitioner was not engaged in work traditionally performed by seamen and therefor was not entitled to a warranty of seaworthiness.

Petitioner's motion for a new trial (which consisted almost exclusively in an attack on petitioner's own witness Earl LeGarde) was denied by the Trial Court.

On appeal to the United States Court of Appeals for the Second Circuit petitioner urged that he was entitled to a warranty of seaworthiness, and that the doctrine of *res ipsa loquitur* applied to the point where respondent was under an obligation to come forward and establish its nonliability. The Court of Appeals rejected petitioner's arguments and affirmed the dismissal of his complaint from the Bench at the close of oral argument.

There is no issue presented in this case as to whether the vessel was or was not "in navigation". Respondent's counsel has admitted throughout the litigation that the vessel was "in navigation". The crux of the case was

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* Number references preceded by the letters Tr. refer to pages of the original trial transcript.

whether the warranty of seaworthiness extended to petitioner because of the contention by respondent that petitioner was not performing duties traditionally performed by members of a ship's crew.

POINT I

Petitioner was not entitled to the warranty of seaworthiness because he was not engaged in work traditionally performed by seamen.

Since the respondent has admitted that s/s Export Commerce was "in navigation" at the time petitioner sustained his injuries in the drydock, no general claim has been made that the respondent did not warrant the seaworthiness of the vessel. In order for petitioner to recover on his unseaworthiness claim, however, he had the burden of establishing not only that an unseaworthy condition existed, but that he was himself entitled to the warranty of seaworthiness.

The ground rules for a determination on this point were set forth by the Supreme Court of the United States in *United Pilots Association* v. *Halecki*, 358 U. S. 613 (1958). In that case the vessel had been brought into the shipyard for annual overhaul. One phase of the overhaul called for dismantling and cleaning the ship's generators with carbon tetrachloride. Halecki, an empolyee of a subcontractor involved in the carbon tetrachloride cleaning, became ill from inhalation of carbon tetrachloride fumes and died two weeks later. An issue arose as to whether Halecki was entitled to the warranty of seaworthiness. The Court wrote as follows at page 617:

> "*Seas Shipping Co.* v. *Sieracki* [328 U.S. 85] and *Pope & Talbot* v. *Hawn* [346 U.S. 406] made clear that the shipowner could not escape liability for unseawothiness by delegating to others work traditionally done by members of the crew. Whether

> their calling be labeled 'stevedore,' 'carpenter,' or something else, those who did the 'type of work' traditionally done by seamen, and were thus related to the ship in the same way as seamen 'who had been or who were about to go on a voyage,' were entitled to a seaworthy ship."

The Court then continued by stating that Halecki was not doing work traditionally done by seamen, writing as follows:

> "Neither these decisions nor the policy that underlies them can justify extension of liability for unseaworthiness to the decedent in the present case. The work that he did was in no way 'the type of work' traditionally done by the ship's crew. It was work that could not even be performed upon a ship ready for sea, but only when the ship was 'dead' with its generators dismantled. Moreover, it was the work of a specialist, requiring special skill and special equipment—portable blowers, air hoses, gas masks, and tanks of carbon tetrachloride, all brought aboard the vessel for this special purpose, and none connected with a ship's seagoing operations."

In commenting upon the misleading aspects of labels, such as "electrician", or even, as in our case "machinist", the Court wrote at page 618:

> "It avails nothing to say that the decedent was an 'electrician,' and that many modern ships carry electricians in their crew. *Pope & Talbot* v. *Hawn* explicitly teaches that such labels in this domain are meaningless. See 346 U.S. at 413. It is scarcely more helpful to indulge in the euphemism that the decedent was 'cleaning' part of the ship, and to say that it is a traditional duty of seamen to keep their ship clean. The basic fact is, in the apt words of Judge Lumbard's dissenting opinion in the Court of Appeals, that the decedent 'was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed.'"

The same line of reasoning was followed one year later by our Supreme Court in *West* v. *United States, et al.*, 361 U.S. 118 (1959). In commenting upon petitioner's contention that he was entitled to a warranty of seaworthiness even though he was a shore-based worker, the Court wrote at page 122:

> "It would appear that the focus should be upon the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, *rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury. The job analysis which the latter would call for would lead to fortuitous results.*" (Emphasis supplied.)

More recently, these same standards and tests were endorsed by this Court in *Jackson* v. *Lykes Steamship Co.* 386 U.S. 731 (1967), in footnote 4 on page 734. In that footnote the Court referred to the "wide range of maritime employees [who] have been granted the benefits of the seaworthiness doctrine", but restricted those persons to those "who performed jobs formerly done by seamen".

Petitioner's trial counsel was well aware of the need to meet these test standards, for he called his expert witness Captain Julie Swensson with an eye to establishing that removing or "jumping" a ship's propeller or wheel was work traditionally performed by seamen. The comments of the Trial Court about Captain Swensson's testimony indicate clearly that it too was acutely aware of the decisions of this Court on the question:

> "Captain Swensson testified on the question of whether or not the work of jumping a wheel could be considered traditional seamen's work, even if at the present day it may be done by specialist land-side teams. The Captain's testimony demonstrated the opposite of plaintiff's contention. (A-9) * * *
> No one knew of a case in which a ship's crew had jumped a wheel. Captain Swensson went only

> so far as, in effect, to say that he couldn't see any particular reason why a crew could not undertake the job. He said no more than that any crew of ablebodied handymen could do the job under right supervision. Indeed there appears to be only one instance in which a propellor was reportedly changed by a ship's crew, and the incident was remarkable enough to become a little legend." (A-10)

Furthermore, petitioner's attempt to characterize himself as a machinist engaged on "routine maintenance work" did not carry the day, for the Trial Court rejected this contention writing:

> "The conclusion is inevitable that the jumping of a wheel was not ship's work or crew work either in tradition or in current practice. In this situation, no help is gained by reference to an extended concept of crew work which would define it in terms of the overall nature of the whole job undertaken at Todd and de-emphasize the nature of the subordinate activity within that whole. In a generalized sense drawing a tailshaft is related to ship maintenance and certification, but it is not an operation that could normally be done at sea, and is sufficiently specialized to remove it from the class of activities analogous to crew activities and in that sense entitling the workers involved in it to the warranty of seaworthiness. It is peculiarly a shipyard kind of work, is work on the vessel rather than work of the ship, and work done by outsiders to the vessel and not crew work normal to the ship." (A-10)

Here again, the Trial Court is obviously referring to the principals set forth by this Court in *Halecki, West,* and *Jackson.*

The only conflict between this case and *Rogers* v. *United States,* 452 F.2d 1149 (5 C.A. 1971), is in result rather than in principle. The Court of Appeals for the Fifth Circuit specifically held at 452 F.2d 1151 that "Rogers was performing work traditionally engaged in by seamen". Since

the vessel in the *Rogers* case was also found to be "in navigation", the Court concluded that Rogers was entitled to the warranty of seaworthiness.

Nor is there any validity to petitioner's suggestion that the result to date in this case is in direct conflict with the case of *Allen* v. *Union Barge Line Corp.*, 239 F. Supp. 1004 (E.D. La. 1965) affirmed 361 F.2d 217 (5 C.A. 1966), cert. den. 385 U.S. 1006 (1967). First, we see nothing in the series of *Allen* opinions from which it could be concluded that the work being performed on the towboat involved the removal of her propeller. Second, Allen was engaged in removing a bearing from a propeller shaft, inside the engineroom of the towboat, and the Trial Court found specifically at 239 F. Supp. 1008:

> " • • • that libellant was performing work traditionally performed by seamen (removing a bearing from a propeller shaft); and that he was, at the time of his injuries, entitled to the warranty of seaworthiness. *Lawler* v. *Socony Vacuum Oil Company, supra*".

The case of *Lawlor* v. *Socony Vacuum Oil Co.*, 275 F.2d 599 (2 C.A. 1960), to which reference was made in the quotation above involved an employee of Bethlehem Steel Company who, while working as a foreman at its shipyard, was engaged in marking up places in the tank of a vessel where there were leaks and cracks in the bulkhead. As Lawlor was descending a ladder it fell backwards causing him to sustain serious injuries. Judge Medina wrote at page 602 in the following terms:

> "Recent holdings by the Supreme Court we think leave us no alternative other than to hold, as we do, that Lawlor was engaged in the type of work traditionally done by seaman [Citations]. Chief Officer Bennett testified that at times when the vessel was not in a shipyard for repairs the location and the temporary repair of cracks and leaks in the tank bulkheads were done by him and by members of the

> crew under his supervision. Equipment, including ladders, was on board and it could be and was used for this purpose."

Petitioner criticizes the Trial Court (and inferentially the United States Court of Appeals for the Second Circuit for affirming) for failing to find that petitioner was engaged in work traditionally performed by seamen. We submit respectfully that if any criticism is in order it should be directed to petitioner and his counsel who failed to produce the type of testimony which compelled the courts in the *Lawlor* and *Allen* cases to conclude that these plaintiffs were engaged in work traditionally done by seamen. Petitioner's witness, Captain Julie Swensson was unable to cite even one instance in which a ship's crew had removed a ship's propeller or drawn a ship's tailshaft. Simply stated, petitioner failed to sustain his burden of proof on this point.

POINT II

There was no *in rem* jurisdiction in this case, and petitioner cannot recover under the doctrine of *res ipsa loquitur* because there was no proof that the work on which he was engaged was under the exclusive control of the respondent.

On appeal to the United States Court of Appeals for the Second Circuit petitioner raised for the first time the claim that he was entitled to recover under the doctrine of *res ipsa loquitur*. Perhaps this was triggered by the Trial Court's comment in its opinion:

> "Even if *res ipsa loquitur* be invoked it would not be directed to the ship or its owners but to Todd, which was in charge of the work on its drydock and under its sole supervision". (A-11)

Now, for the first time, Petitioner raises another new point—that where *in rem* jurisdiction has been perfected

there is some additional obligation on the part of a respondent-shipowner to come forward and explain an otherwise unexplained accident.

At the time s/s Export Commerce was in Todd's drydock respondent still had a Master, officers and crew on the payroll assigned to the vessel, but there was no evidence pointing to the presence of any of these persons, either aboard the vessel, or even in Todd's shipyard at the time of the work being performed by petitioner on the propeller and shaft of the vessel.

The only witness to testify to the presence or non-presence of defendant's employees was Earl LaGarde who, when asked whether he had seen any of the officers of the vessel around at the time the work was going on, replied:

> "Not off-hand I can't recall seeing any officers." (B-58)*

Mr. LaGarde's "best recollection" was that he had seen defendant's port engineer, but he added twice:

> "I can't swear to it." (B-58)

This same witness, Todd's assistant night foreman, admitted that he was in charge of the job (Tr.-15), and that the machinist and riggers were working under his supervision (Tr.-26). He also testified that all of the equipment used to remove the ship's propeller was Todd's gear (Tr.-28).

The decision of the Trial Court reflects the non-involvement of the ship's personnel where it was stated:

> "The work was wholly committed to Todd and the interests of the vessel owner and those in responsible charge of the vessel was not in the performance, direction or supervision of the work, but only in checking the adequacy of Todd's completed performance of it." (A-11)

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* Number references preceded by the letter B refer to pages of petitioner's appendix in the Court of Appeals.

In commenting further upon plaintiff's negligence claim against the defendant shipowner the Trial Court wrote:

> "What might have been the responsibility of ship's crew if they had seen something done which manifestly endangered someone in plaintiff's position is not raised by the case. There was no evidence that any ship's crewmen was on hand at the time, or either was or should have been in a position to have observed the existence of the condition involved, or to have understood whether or not a danger was present." (A-11)

The fact situation is closely akin to what was presented in *West* v. *United States, supra,* where this Court wrote at page 123:

> "Although some of respondent's employees were on board the ship here, this would not attach liability since they gave no orders, and did not participate in the work or supervise its progress, but were simply inspectors or observers."

In *Prosser on Torts,* Fourth Edition, 1971, chapter 4, page 214, the elements for the application of the doctrine of *res ipsa loquitur* are set forth in the following terms:

> "The conditions usually stated in America as necessary for the application of the principle of *res ipsa loquitur* were derived originally from the first edition of Wigmore on Evidence, which appeared in 1905. They are as follows: (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff."

In *Richardson on Evidence,* Third Edition, 1964, § 93, page 67, the New York Rule is stated to be:

> "Where the instrumentality which caused the accident was in the exclusive control of the defend-

> ant, and the accident which has occurred is one which would not ordinarily happen without negligence, the facts are sufficient to justify an inference of negligence and to cast upon the defendant the burden of coming forward with an explanation."

Since the defendant-shipowner in this case rested at the end of plaintiff's evidence, the following statement in *Richardson,* § 93, page 68, would also seem to be in point:

> "Even if the defendant fails to introduce any evidence, the trial court may not direct a verdict in favor of the plaintiff except, possibly, where the plaintiff's prima facie proof is so convincing that the inference of negligence is inescapable."

In *Manhat* v. *United States,* 220 F.2d 143 (2 C.A. 1955), cert. den. 349 U.S. 966 (1955), Judge Waterman of the United States Court of Appeals for the Second Circuit commented in the following terms at page 145 of 220 F.2d:

> "The rule of res ipsa loquitur deals only with permissible inferences from unexplained events, Johnson v. United States, 1948, 333 U.S. 46, 68 S. Ct. 391, 92 L.Ed. 468; Jesionowski v. Boston & Maine R. R., 1947, 329 U. S. 452, 67 S. Ct. 401, 91 L.Ed. 416 and means simply that, in a given case, the facts of the occurrence warrant the inference of negligence, Sweeney v. Erving, 1913, 228 U. S. 233, 33 S. Ct. 416, 57 L.Ed. 815. Thus, when the facts disclose that the injured party was not at fault, that the instrumentality causing the injury was in the control of the party against whom the doctrine is sought to be invoked and the occurrence is otherwise unexplained, it is permissible to infer that the party in control was negligent."

Since there was no evidence that the job of removing the propeller was under the control of respondent, let alone under its exclusive control, and since the Trial Judge found as a fact that the work "was wholly committed to Todd", there is no room for application of the doctrine of *res ipsa loquitur.*

Even more puzzling is petitioner's reference to *in rem* jurisdiction as it might affect the obligation of the respondent to come forward and explain the accident. On page 15 of the Petition we are referred to the decision of the United States Court of Appeals for the Fifth Circuit in *Johnson* v. *Oil Transport Company,* 440 F.2d 109 (5 C.A. 1971) and more particularly to footnote no. 6 at the bottom of page 115. That footnote reads as follows:

> "6. Appellant's contention that possession and control of the vessel are immaterial here because in rem liability has been asserted against the vessel, is untenable. As appellee points out (and we have found nothing in the record to the contrary), in rem jurisdiction was not perfected in this case by appellant. There, of course, can be no in rem liability without compliance with the requisites for in rem jurisdiction. See Federal Rules of Civil Procedure. Supplemental Admiralty Rule C."

Equally "untenable" is the argument made by petitioner here, for there was no *in rem* jurisdiction and there could not be any *in rem* liability.

The captions on the originals and service copies of the Summons and Complaint as prepared by petitioner's counsel appear as follows:

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

71 C 1190

~~LIBEL~~ and COMPLAINT ~~IN REM and PERSONAM~~

Plaintiff Demands A Trial By Jury

JOSEPH DAVIS,

Libelant,

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC., and S. S. EXPORT COMMERCE, her engines, tackle, cargo, gear and apparel.

Respondents.

The words "*libel* and *in rem* and *personam*" had been lined through leaving us with a civil action with a jury demand.

No warrant for the arrest of the vessel was issued by the Clerk or delivered to a U. S. Marshal for service as required by Rule C (3) of the Supplemental Rules for Certain Admiralty and Maritime Claims. S/S Export Commerce was neither libeled nor attached. No claim of owner was called for or filed.

The action started as a civil action with a trial by jury demanded. Any doubt along these lines is resolved by the Order of Judge John F. Dooling of the United States District Court for the Eeastern of New York, to whom the action has been assigned for all purposes including trial. During the course of an initial pre-trial conference before Judge Dooling on April 5, 1972, counsel

for respondent raised the point that since plaintiff and defendent were both citizens of the State of New York, there was no diversity of citizenship so as to entitle plaintiff to remain on the civil side of the Court and have a trial by jury. Judge Dooling's Conference Memorandum and Order of April 5, 1972, opened as follows:

> "There is no diversity of citizenship and the jurisdiction of this Court in this case depends on its being an admiralty case. It is, accordingly, a non-jury case and the demand for a jury trial contained on the face of the complaint is of no effect."

At most, therefore, this must be considered as an *in personam* action "in admiralty". There were no steps taken to perfect *in rem* jurisdiction, and the vessel, s/s Export Commerce, was never before the Court.

Footnote 6 from *Johnson* v. *Oil Transport Company, supra,* cited by petitioner in his support, could not be more in point to refute petitioner's entire argument.

CONCLUSION

The petition should be denied.

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